INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	1
Reasons relied on for the allowance of the writ	4
Prayer for writ	4
Brief in support of petition	7
Opinion of the court below	7
Jurisdiction	7
Statement of the case	8
Specification of errors	9
Argument	9
Summary of argument	14
Conclusion	15

Cases Cited

Bailey v. *Central Vermont RR.*, 319 U. S. 350, 87 L. Ed. 1445	12
Blair v. *B. & O. RR.*, 323 U. S. 600, 89 L. Ed. 490	11
Boston & Maine v. *Cobana*, 148 F. (2d) 150	15
Boston & Maine v. *Kyle*, 156 F. (2d) 112	15
Boston & Maine v. *Meech*, 156 F. (2d) 109	15
Bozier v. *B. & O. RR.*, 152 F. (2d) 436	15
Egslaer v. *Scandrett*, 51 F. (2d) 572	13
Eiseman v. *Penn. RR.*, 151 F. (2d) 222	15
Ellis v. *Union Pacific*, 67 S. Ct. 598	14
Griswold v. *Gardner*, 155 F. (2d) 323	14
Jacobs v. *City of New York*, 315 U. S. 752; 86 L. Ed. 1166	10
Lavender v. *Kurn*, 327 U. S. 645, 90 L. Ed. 916	10
Mumma v. *Reading Co.*, 146 F. (2d) 215	12
Owens v. *Union Pacific*, 319 U. S. 795, 87 L. Ed. 1683	12
Pauly v. *McCarthy*, Law Edition Advance Sheet 91, page 785	14
Pierce v. *Leheigh Valley RR.*, 157 F. (2d) 252	15
Scott v. *B. & O. RR.*, 151 F. (2d) 61	15

Page

Tennant v. *Peoria & Pekin*, 321 U. S. 29, 88 L. Ed. 520 10
Tiller v. *Atlantic Coast Line*, 318 U. S. 54, 87 L. Ed. 611 12
Waddell v. *Chicago & E. I. RR.*, 142 F. (2d) 309 15

STATUTES CITED

Title 28, Section 347 U. S. C. 8
Title 45, Section 51 U. S. C. 1, 8
Title 45, Section 56 U. S. C. 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 281

ALICE WOLFE, ADMINISTRATRIX OF THE ESTATE OF OWEN WOLFE, DECEASED,

Petitioner,

vs.

BERRYMAN HENWOOD, TRUSTEE, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The Petition of Alice Wolfe, Administratrix of the Estate of Owen Wolfe, deceased, respectfully shows to this Honorable Court:

A

Summary Statement of Matter Involved

This action was brought under Federal Employers' Liability Act (Title 45, Section 51, U. S. C.) by Alice Wolfe, widow of Owen Wolfe, deceased, as Administratrix, to recover for herself, minor son, and for the benefit of his

estate, damages for injuries received by Owen Wolfe (R. 1 and 6).

Jury trial ending on the 18th day of December, 1946, in the District Court resulted in verdict in the sum of $4589.00 for benefit of widow and minor child and $500.00 for estate, for which amount judgment was granted by the District Court on the same day (R. 10). Thereafter on January 14, 1947, the Trial Court granted respondent's motion for judgment notwithstanding verdict and judgment (R. 21 and 134).

In 1917, Owen Wolfe, colored, accepted employment, as a section laborer, with the St. Louis Southwestern Railroad, better known as the Cotton Belt (R. 41). Shortly after such employment Wolfe sustained an injury, which resulted in loss of vision in right eye (R. 43). When he had recovered sufficiently to resume work he was given light work in the yards of respondent, in Jonesboro, Arkansas. This work consisted of filling, cleaning lenses, adjusting wicks and otherwise maintaining 75 kerosene switch stand marker lights, oiling manually operated switches, other work around the switches such as seeing that they were free and clear for operation, and some janitor work. He continued this light work until the date of his injuries (R. 43-44).

On the 18th day of April, 1945, upon reporting for work at 7:00 A. M., he was directed by J. D. Wilson, the section foreman (R. 30), whom respondent admits was Wolfe's immediate superior (R. 77), to leave his regular work and perform certain work for the Water Service Department (R. 30). This work was that of cleaning two concrete catch basins about four feet square and three feet deep which had become filled with a mixture of fuel oil, used for oil burning locomotives, and water. These pits were located on the underground pipe lines going from the

storage tank to the spout where the locomotives were fueled and located within the yards of defendant.

The Water Service men, employees of respondent (R. 65), directed that the fuel oil and water be removed from the pits by manually bailing out the liquid using open mouthed buckets (R. 66). When dipped from the pits, the oil was taken to a trough, where it ran back into the storage tank and the water was dumped in a low place about twelve feet from the basins (R. 72). In doing this work which required 3½ hours, Wolfe's overall clothing, from the waist down to the shoes, was saturated with the fuel oil (R. 33). Respondent admits that he made no offer of protective clothing to perform this unusual work (R. 82). It is significant, however, that two men from the regular section gang had rubber boots (R. 33).

Upon completing this task, Wolfe and two other colored laborers were directed by the Water Service men to return to the tool house a short distance away and resume their regular tasks (R. 66). At the tool house, though there were at least 20 men then working in this section gang, no facilities were provided for cleansing themselves (R. 38). Wolfe is not shown, by the proof, to have ever performed this type of work before, but it was shown that it was the custom of the other section men, to use gasoline to cleanse themselves, after having handled objects, which got oil on their clothing or bodies (R. 36). The three colored men, following said custom, obtained some cotton waste and soaked it in gasoline and rubbed their clothing, in an effort to remove as much of the fuel oil as was possible (R. 35). After having swabbed their clothing, the waste was then thrown out in front of the tool house. Upon reflection that it was dangerous to leave gasoline soaked waste lying about, Wolfe then undertook to burn the waste and in so doing set fire to his glove, this fire was

then communicated to his clothing (R. 59) and he sustained burns causing his death on July 11, 1945 (R. 77).

The respondent did not introduce any testimony, so the testimony for petitioner may be said to be undisputed, with the exception of the widow and since the amount of verdict is not complained of, it is immaterial at this time.

B

Reasons Relied on For the Allowance of the Writ

1. Petitioner alleged in her complaint that respondent was negligent (1) in failing to provide her intestate with a safe place to work; (2) in failing to provide her intestate with proper equipment and facilities with which to do the work. Specifically, these acts of negligence were: (1) failing to use a pump with which to remove the oil and water, which was a safer method; (2) in failing to provide protective clothing in the form of rubber boots which would have furnished adequate protection from the oil; (3) in failing to provide adequate safe facilities and cleansing agents for removing the oil from clothing of her intestate; (4) in failing to provide adequate facilities and means of safe disposal of waste.

2. The United States Circuit Court of Appeals, Eighth Circuit, erred in affirming the decision of the Trial Court, wherein judgment was granted respondent notwithstanding verdict of the jury and judgment entered thereon.

3. The decision of the Circuit Court of Appeals in so holding, is in conflict with many of the decisions of this Court, particularly set out in part 5 (A) of the Brief submitted herewith.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this

Honorable Court, directed to the Eighth Circuit Court of Appeals, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 13,497, Alice Wolfe, Administratrix of the Estate of Owen Wolfe, deceased, appellant vs. Berryman Henwood, Trustee, St. Louis Southwestern Railway Company, appellee, and that the said judgment of the Circuit Court of Appeals (Eighth Circuit), may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may see meet and just; and your petitioners will ever pray.

ALICE WOLFE,
Administratrix of the Estate of
Owen Wolfe, Deceased;
By ARTHUR L. ADAMS,
Counsel for Petitioner.
J. M. WILLEMIN,
ARTHUR L. ADAMS, JR.,
Jonesboro, Arkansas,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 281

ALICE WOLFE, Administratrix of the Estate of Owen Wolfe, Deceased,

Petitioner,

vs.

BERRYMAN HENWOOD, Trustee, St. Louis Southwestern Railway Company

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinion of the Court Below

The opinion in the United States Circuit Court of Appeals, Eighth Circuit, was filed on the 7th day of July, 1947, has not been printed, but is shown in record at (R. 140-147).

II

Jurisdiction

1. This cause of action was filed under Title 45, Section 51 U. S. C.

2. Jurisdiction is vested in the Federal Court to hear such cases under Title 45, Section 56 U. S. C.

3. Jurisdiction is vested in this Court by Title 28, Section 347 (Judicial Code) U. S. C.

4. The date of the judgment to be reviewed is July 7, 1947 (R. 147).

III

Statement of the Case

In addition to the statement set out in Summary Statement of the Matter Involved, petitioner introduced other evidence as follows:

A chemist, who qualified as an expert, especially in petroleum products (R. 83), testified that the most commonly used method of cleaning catch basins is by the use of a pump (R. 88), and that it would have been just as practicable to use a portable hand pump instead of buckets in cleaning the two pits involved herein (R. 92). Because the handling of petroleum products, at any stage, is hazardous (R. 85), in performing such work precautions are usually taken to furnish the employee with rubber boots which would have provided adequate protection (R. 92).

That once a person is covered with fuel oil (Analysis shown at page R. 81) the safest procedure would be to take his clothes off and give him a bath (R. 93).

That worn clothing saturated with fuel oil could not be cleansed by spot cleaning with waste soaked in gasoline, but that the effect would be to create a mixture of fuel oil and gasoline which was readily ignitable, whereas the fuel oil alone was not (R. 93). Witness made experiments under controlled laboratory conditions (R. 95), one experiment burning gasoline soaked cotton cloth and then another with equal amounts of gasoline and fuel oil. The mixture of fuel oil and gasoline created a temperature equal to 9/10ths

on the meter as against 6/10ths for the gasoline alone (R. 99). The mixture of fuel oil and gasoline required forty units of time to burn as against twenty-five units of time for gasoline alone (R. 100).

IV

Specification of Errors

1. The United States Circuit Court of Appeals, Eighth Circuit, erred in affirming the judgment of the District Court, wherein judgment was granted respondent notwithstanding verdict for petitioner and judgment rendered thereon.

V

Argument

The Circuit Court of Appeals found as a matter of law (R. 145) that Wolfe's negligent act was the sole cause of the accident. The Trial Court gave an instruction to the jury at the request of the respondent, as follows:

> "The undisputed proof in this case is to the effect that Owen Wolfe, himself, selected the manner in which, and the material with which to clean oil from his gloves and pants, and the manner in which to dispose of the gasoline saturated waste. If you find from a preponderance of the evidence in this case that Wolfe was negligent, either in the method of cleaning his clothes or in disposing of the waste, and such negligence on his part was the sole cause of his injury, your verdict will be for the defendant" (R. 119).

That it was a jury question is admitted by counsel for respondent in his objections to a requested instruction of petitioner. Counsel stated: (4)

> "• • • substitutes the opinion of the court as to the law and fact for that of the jury, *who has the sole*

and exclusive duty of determining what is negligence under the proof" (R. 108).

The Court of Appeals further stated: (R. 144)

"The job to be performed was a simple task which hardly required use of protective clothing as a safety measure."

The Trial Court gave an instruction as follows: (R. 118)

"If you find that the dipping of the oil was a character of employment, such as would in the normal course of events, taking into consideration the means used, result in danger to the safety of Wolfe, the defendant having placed him in this condition was required to exercise reasonable care to provide suitable means for the removal of the oil from his clothing, and if you find that defendant failed to exercise such care, then you should take this into consideration in determining whether defendant is liable."

It is apparent, therefore, that the Circuit Court of Appeals reweighed the evidence and set aside the jury verdict contrary to the holding of this Court in *Tennant* v. *Peoria & Pekin*, 321 U. S. 29, 88 L. Ed. 520.

The court's statement on page 144 following the above quotation, indicating that Wolfe should have furnished his own boots is contrary to the holding of this Court in *Jacobs* v. *City of New York*, 315 U. S. 752, 86 L. Ed. 1166.

This Court held in *Lavender* v. *Kurn*, 327 U. S. 645; 90 L. Ed. 916, that whenever the evidence is such that fair-minded men may draw different conclusions, it is a case for the jury.

Under instructions of the court, the jury in this case determined that the chain of causation commencing with the work at 7:00 A. M. on the day of injury was not broken and led straight to the injuries. There was adequate proof from which the jury could have found that the lack of vision

in the right eye contributed to Wolfe getting more oil on his clothing than the others. It could have found that this unusual work which he is not shown to have before performed, did not allow him to know the proper method of protecting himself or methods of cleansing; it could have found that Wolfe would not have died from the injuries and resultant infection except for the greater temperature produced by the mixture of the fuel oil and gasoline and longer burning. There is nothing in the record to indicate that Wolfe had the remotest idea of the result of mixing these two petroleum products. The respondent does not deny that he knew of the practice of using gasoline for the removal of oils from the persons and clothing of the regular section hands. He is presumed then, to have known that Wolfe would use gasoline unless other methods were provided for the removal of the fuel oil and that this method of removal would certainly result in a dangerous condition. Further, it is not shown that there is any appreciable lapse of time from the ending of the work of bailing out the pits to the time of injury.

This Court held in *Blair* v. *B. & O. RR.*, 323 U. S. 600; 89 L. Ed. 490:

> "The negligence of the employer may be determined by viewing its conduct as a whole and especially is this true in such a case as this where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern and where each imparts character to the others."

Following this expression of the court literally, every element of negligence alleged in this case is closely interwoven with the others and none of the subsequent events would have occurred except for the first act of negligence in failing to remove the oil from the pit in a safe manner and proceeding act by act to the fatal burning of Wolfe. It

would be to ignore the common affairs of life to impart to this colored man, who could read and write with effort, any special knowledge when he was accustomed to being directed in his work by his supervisors. If the respondent was negligent in placing him in the dangerous condition and there was no break in the chain of causation, then his contributory negligence could not prevent recovery.

In *Owens* v. *Union Pacific,* 319 U. S. 795, 87 L. Ed. 1683, this Court held that something more than contributory negligence was required to defeat recovery under the Employers' Liability Act.

In *Mumma* v. *Reading Company,* 146 Fed. (2d) 215, Third Circuit, the Court adopted as a part of its opinion the following statement:

> "It is only where the alleged negligent act or omission on the part of the employee was the sole proximate cause of his injury, without any contributing causation on the part of the employer, that the employee will be denied in toto a right of recovery under the Federal Employers' Liability Act."

This Court in *Tiller* v. *Atlantic Coast Line,* 318 U. S. 54; 87 L. Ed. 611, quoted a portion of the Senate Judicial Committee in its report on the 1939 Amendment to the Federal Employers' Liability Act, as follows:

> "The adoption of this proposed amendment will, in cases which no recovery is now allowed, establish the principle of comparative negligence, which permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer and, in the light of the comparison, do justice to all concerned."

In *Bailey* v. *Central Vermont RR.,* 319 U. S. 350; 87 L. Ed. 1445, this Court held:

> "Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as

the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic and expensive as compared with the more modern systems of workmen's compensation. But, however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In *Egslaer* v. *Scandrett*, 51 Fed. (2d) 572, the Seventh Circuit Court of Appeals stated:

"The words 'in part' have enlarged the field or scope of proximate causes—in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even thought it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For instance, the case may be the first acting cause which sets in motion the second cause which was the immediate, the direct cause of the accident. * * *"

"* * * The proximate legal cause is that acting first and producing the injury, either immediately or by setting other events in motion, all constituting a natural and continuous chain of events, each having a close causal connection with its immediate predecessor, the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, under such circumstances that the person responsible for the first event should, as an ordinarily prudent and intelligent person, have reasonable ground to expect at the moment of his act or default that an injury to some person might probably result therefrom. The act of one creating a peril may none the less be the legal cause of an injury to another because of intervening events which might or might not take place, provided such events are natural and

probable, and provided the probability of injury might be reasonably anticipated."

In *Griswold* v. *Gardner,* 155 Fed. (2d) 323, Seventh Circuit Court of Appeals said:

> "That the Supreme Court treats the question of negligence and proximate cause as a jury question in this class of cases is clearly shown by a study of these cases. Moreover, not only are these issues to be decided by the jury, but its decision is unassailable. In fact, it is difficult to conceive of a case brought under this Act where a trial Court would be justified in directing a verdict."

Certiorari was denied by this Court on October 14, 1946 (91 L. Ed. 41).

It is, therefore, apparent that the petitioner submitted a case for determination by the jury. The amount of the verdict clearly shows that the jury properly applied the law with reference to diminution of damages due to contributory negligence. This case having been heard by a jury and a finding entered that the defendant was guilty of negligence "in part", the Circuit Court of Appeals, therefore, erred in affirming the District Court in setting aside the verdict of the jury.

Summary of the Argument

A

The decision below is contrary to and in conflict with the decisions of this Court and the other Circuit Courts of Appeal as follows:

Ellis v. *Union Pacific,* decided February 3, 1947, 67 S. Ct. 598.

Pauly v. *McCarthy,* decided March 10, 1947, Law Edition Advance Sheet 91, page 785.

Waddell v. *Chicago & E. I. RR.*, 142 Fed. (2d) 309, Seventh Circuit.

Boston & Maine v. *Cobana*, 148 Fed. (2d) 150, First Circuit.

Scott v. *B. & O. RR.*, 151 Fed. (2d) 61, Third Circuit.

Eiseman v. *Penn. RR.*, 151 Fed. (2d) 222, Third Circuit.

Bozier v. *B. & O. RR.*, 152 Fed. (2d) 436, Third Circuit.

Boston & Maine v. *Kyle*, 156 Fed. (2d) 112, First Circuit.

Boston & Maine v. *Meech*, 156 Fed. (2d) 109, First Circuit.

Pierce v. *Leheigh Valley RR.*, 157 Fed. (2d) 252, Third Circuit.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that error of the Court of Appeals, as shown herein, may be corrected, and that to such an end a writ of certiorari should be granted, and this Court should review the decision of the United States Circuit Court of Appeals for the Eighth Circuit and finally reverse it.

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